Supreme Court, U.S.
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No. 03-_____

In The

# Supreme Court of the United States

ST. VINCENT MEDICAL CENTER; DAUGHTERS OF CHARITY HEALTH SYSTEMS INC.,

*Petitioners,*

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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January 29, 2004

*AMERICAN FINANCIAL PRINTERS • (202) 464-5500*

## QUESTION PRESENTED

Whether it was error for the United States Court of Appeals for the Ninth Circuit, in conflict with decisions of this Court and other federal courts of appeals, to hold that a labor union may compel private arbitration of election objections to a National Labor Relations Board (NLRB) conducted representation election, whose outcome has already been certified by the NLRB?

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding in the court of appeals below are listed in the case caption.

Pursuant to Rule 29.6, corporate Petitioners St. Vincent Medical Center and Daughters of Charity Health Systems, Inc. provide the following corporate disclosure information:

St. Vincent Medical Center is a non-profit corporation whose parent corporation is the Daughters of Charity Health Systems, Inc.

Daughters of Charity Health Systems, Inc. is a non-profit corporation that has no parent corporations and no publicly held company owns 10% or more of its stock.

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St. Vincent Medical Center and Daughters of Charity Health Systems, Inc. (collectively "St. Vincent") respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Service Employees International Union v. St. Vincent Medical Center*, 344 F.3d 977 (9th Cir. 2003), which is reproduced in the Petition Appendix ("Pet. App.") at pages 1a-20a. The unpublished order of the court of appeals denying the petition for rehearing en banc is reproduced at Pet. App. 21a. The unpublished order of the district court granting petitioners' motion to dismiss the complaint to compel arbitration with prejudice is reproduced at Pet. App. 22a-24a.

## JURISDICTION

The judgment of the court of appeals was entered on September 19, 2003. Rehearing en banc was denied on November 5, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The **Labor Management Relations Act** § 301, 29 U.S.C. § 185(a) provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in

controversy or without regard to the citizenship of the parties.

The **National Labor Relations Act** § 9, 29 U.S.C. § 159, provides in relevant part:

> (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board - (A) by an employee or labor organization acting on their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section .... the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. .... If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The **Rules and Regulations of the National Labor Relations Board,** Rule 102.69, 29 C.F.R. § 102.69, provides in relevant part:

> Sec. 102.69 *Election procedure; tally of ballots; objections; certification by the Regional Director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing*
>
> (a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. ... Upon the conclusion of the election

the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. ...

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to section 102.70, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

## STATEMENT OF THE CASE

This case arises from an attempt by Respondents, Service Employees International Union and Service Employees International Union Local 399 (collectively, the "SEIU"), to compel Petitioner St. Vincent to privately arbitrate the SEIU's untimely objections to the results of a union representation election conducted by the NLRB. The NLRB conducted the representation election pursuant to an express written agreement by the parties to have the election, including any post-election objections, processed by the NLRB in accord with the NLRB's Rules and Regulations.

On January 24, 2000, the SEIU filed with the NLRB a petition for a representation election to be held among a unit of service and skilled maintenance employees of St. Vincent Medical Center (SER 9).[1] The SEIU's election petition was filed with the NLRB pursuant to Section 9(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(e) (1935). Subsequent to the filing of its NLRB election petition, the SEIU signed a private agreement in April 2001 with Catholic Healthcare West ("Agreement") (ER 6-17). The terms of that Agreement later became applicable to St. Vincent Medical Center. Among its terms, the Agreement provided for representation elections to be conducted, at the SEIU's option, either by the NLRB or by a private election officer (ER 12 at ¶E(7)). Under the parties' Agreement,where the SEIU chose to have an NLRB conducted election, "[i]n such situation, the NLRB shall substitute for the role of Election Officer" applying the Agreement's recognition procedure *"except as adjustments may be required by the NLRB"* (ER 12 at ¶E(7), emphasis added). The parties' Agreement also placed certain restrictions on the nature and scope of the parties' pre-election campaign conduct.

The SEIU voluntarily chose to continue to pursue an NLRB-conducted election in this matter. Thus, on September 7, 2001, the SEIU and St. Vincent Medical Center signed a NLRB "Stipulation" agreeing that a secret ballot election would be conducted by the NLRB. The Stipulation provided that "terms and conditions as contained in the Stipulated Election Agreements previously executed by the parties in these matters shall still apply" (SER 11-14). In a NLRB "Stipulated Election Agreement" previously entered into between the parties in February 2000, the SEIU expressly agreed that all post-election *"procedures after the ballots are counted shall conform with*

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[1] "ER" refers to the appellate Excerpt of Record; "SER" refers to the appellate Supplemental Excerpt of Record.

*the Board's Rules and Regulations"* (SER 15, emphasis added).

Pursuant to the parties' NLRB "Stipulation" and the previous NLRB "Stipulated Election Agreement," the NLRB conducted a representation election on September 26 and 27, 2001. On September 27, 2001, the NLRB issued a Tally of Ballots stating that the SEIU did *not* have enough votes cast in its favor to become the collective bargaining representative for the bargaining unit (SER 22). Under the NLRB's Rules and Regulations governing representation proceedings, the SEIU had seven (7) days after the Tally of Ballots was prepared to file any "objections to the conduct of the election or to conduct affecting the results of the election" with the NLRB Regional Director (29 C.F.R. § 102.69(a)). The SEIU did *not* file any election objections with the NLRB. After the seven-day statutory period within which to file objections had elapsed, the NLRB certified the results of the election on October 16, 2001, pursuant to NLRB Rule 102.69(b) (SER 24-25).

After the SEIU's time to file election objections with the NLRB had already expired, the SEIU first raised a claim directly with St. Vincent that it had allegedly engaged in pre-election campaign conduct in violation of the parties' Agreement. With respect to that alleged pre-election conduct, the SEIU stated, *"[p]lease consider these objections to the election* among the service, maintenance, and skilled maintenance employees at St. Vincent Medical Center that took place on September 26 and 27th, 2001" (ER 52, emphasis added). Thereafter, the SEIU requested that its "elections objections" be submitted for resolution by a private arbitrator under an arbitration provision contained in the parties' Agreement. (ER 19, 24). St. Vincent, in turn, rejected the SEIU's request to arbitrate the election objections, pointing out that "no timely objections were ever

filed with the Board [NLRB]" and that the NLRB had already certified the results of the election (ER 21, 26).

*Proceedings and Disposition in the District Court.* Rather than properly pursue any election objections through the NLRB's established post-balloting procedure, the SEIU waited more than six months and on April 3, 2002, filed a Complaint to Compel Arbitration ("Complaint") in the U.S. District Court for the Northern District of California seeking to have a private arbitrator rule on its election objections to the NLRB-conducted election (ER 1-5). The SEIU's Complaint specifically sought an order compelling St. Vincent *"to arbitrate the dispute regarding the SEIU's objections to the September 26 and 27, 2001 election"* (ER 5, emphasis added).

As it was undisputed that the NLRB had already certified the results of the election when no election objections were filed with the Board, St. Vincent responded to the SEIU's Complaint to Compel Arbitration by filing a Motion to Dismiss the Complaint pursuant to the Federal Rule of Civil Procedure ("FRCP") 12(b)(1) on the ground that the district court lacked subject matter jurisdiction over the matter. St. Vincent submitted that, although the SEIU's Complaint was purportedly brought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a) (1947), the district court lacked subject matter jurisdiction to entertain the SEIU's Complaint because it raised a representational matter over which the NLRB possessed primary jurisdiction.[2] Alternatively, St. Vincent

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[2] Pursuant to Rule 14(g)(ii) of the Rules of this Court, Petitioners state that the district court's jurisdiction was based on the inherent power that every federal court has to determine as a preliminary matter its own subject matter jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 290-92 & n. 57 (1947). As noted, Respondents also claimed that jurisdiction for the district court existed under 29 U.S.C. § 185(a).

also submitted that the SEIU's Complaint should be dismissed under FRCP 12(b)(6) for failure to state a claim upon which relief could be granted because the NLRB had already certified the results of the election following the SEIU's failure to file any timely objections with the Board (ER 27-29).

After the parties fully briefed and argued the issues, on June 3, 2002, the district court, per the Honorable Manuel L. Real, granted St. Vincent's Motion to Dismiss (Pet. App. 19a-20a). The SEIU thereafter appealed that dismissal to the Ninth Circuit Court of Appeals.

*The Court of Appeals' Decision.* On appeal, the Ninth Circuit reversed. In a dramatic departure from existing law, the Ninth Circuit found that although the NLRB conducted the election at St. Vincent Medical Center and already certified the election's result, that did not prohibit the district court from compelling the private arbitration of the SEIU objections to the September 26-27, 2001 election (Pet. App. at 13a). The Ninth Circuit noted that LMRA § 301 provides concurrent jurisdiction with the NLRB over suits for violations of contracts between an employer and a labor organization. Although the court of appeals recognized that federal courts must defer to the NLRB's "primary jurisdiction" where an issue is primarily representational, the Ninth Circuit concluded that simply because the SEIU's election objections were based on alleged violations of the Agreement's restrictions on the parties' pre-election campaign conduct, "the major issue cannot be characterized as primarily representational" (Pet. App. at 15a). In reaching this conclusion, the Ninth Circuit relied heavily on the fact that under the parties' Agreement, an arbitrator could not compel recognition of the Union where a majority of voters had not selected representation by the Union. (Pet. App. at 16a). The Court, however, ignored that the SEIU acknowledged on appeal that one of the remedies it might seek from an arbitrator was another

"re-run" election – something that directly impacts the representational decision in this case.

The Ninth Circuit further found that the district court had supposedly erred in finding that SEIU's complaint to compel arbitration failed to state a valid claim for which relief could be granted. The Ninth Circuit concluded that the fact that the NLRB had already certified the results of the election did not prevent an arbitrator from reopening the representation proceeding since the union's election objections again concerned pre-election conduct that involved "alleged violations of the Agreement" (Pet App. at 18a). The Ninth Circuit also held that the NLRB "Stipulated Election Agreement" entered into by the parties, which included the SEIU's agreement that all "postelection and runoff procedures ... after the ballots are counted shall conform with the [NLRB's] Rule and Regulations" did not bar an arbitration of the SEIU's election objection since the union was supposedly challenging pre-election conduct and not the election itself (Pet. App. at 19a). The Ninth Circuit therefore reversed the district court and remanded the case for entry of an order compelling arbitration (Pet. App. at 20a).

## REASONS FOR GRANTING THE PETITION

In conflict with both prior opinions of this Court and other circuit courts of appeal, the Ninth Circuit's decision in this case erroneously permits arbitral intrusion into a matter that falls squarely within the NLRB's "primary jurisdiction" that Congress intended be decided by the administrative expertise of the NLRB. As this Court has made clear, in "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over...." *International Bhd. of Boilermakers [etc.] v. Hardeman*, 401 U.S. 233, 238 (1971). This rule has particular application to the NLRB, and while LMRA § 301 provides federal court

jurisdiction over "suits for violation of contracts between an employer and a labor organization," the courts must nonetheless defer to the NLRB when cases involve "primarily representational" matters within the NLRB's primary jurisdiction.

Until the decision below, both this Court and the other circuit courts of appeals had repeatedly recognized that the determination of "election objections" is a matter uniquely of an administrative nature within the NLRB's special expertise. That is because the NLRB has held that not all improper pre-election conduct by a party, including conduct in violation a private agreement limiting campaign activities, is sufficiently egregious to require a re-run election. Rather, the NLRB uses its administrative expertise to determine how much misconduct is "too much misconduct" such that the voters could no longer cast a free and fair ballot and a new re-run election is required. Contrary to the Ninth Circuit's decision, the resolution of the SEIU's election objections to the NLRB election cannot be decided by looking within the four-corners of parties' Agreement regulating pre-election campaigning, and, as such, the issue in this case was "primarily representational," not primarily contractual. By permitting the arbitration of election objections to an NLRB-conducted election, the Ninth Circuit's decision not only conflicts with rulings of this Court and the other circuit courts of appeals, but also strikes at the heart of the NLRB's "primary jurisdiction." A grant of certiorari is warranted so that this Court can clarify and reaffirm the primary jurisdiction of the NLRB in the resolution of election objections to an NLRB-conducted election, and prevent an evisceration of the "primary jurisdiction" doctrine that will otherwise occur as a result of the Ninth Circuit's decision.

Private agreements limiting pre-election campaign conduct are an increasingly common "part of the contemporary labor-management landscape and an issue of

highest priority to major national unions." (Cohen, "Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?" 16 *The Labor Lawyer* 201, 202 (2000).) Accordingly, the issues raised by the Ninth Circuit's decision regarding the resolution of election objections to an NLRB-conducted election based upon an alleged violation of campaign limitations found in a private agreement are of widespread and practical significance.

The Ninth Circuit's decision further erroneously fails to require compliance with the NLRB Stipulated Election Agreement voluntarily entered into by the parties, by which the SEIU expressly agreed to submit any election objections to the NLRB for decision in accordance with NLRB post-election procedures. By permitting the SEIU to disregard that NLRB Stipulation, the Ninth Circuit decision not only undermines the NLRB's procedures and therefore federal labor policy, but the effect of the Ninth Circuit's ruling is to convert the NLRB into nothing more than the parties' agent for the physical conduct of the election – a role restriction that is also contrary to federal labor law. By fundamentally redefining the role of the NLRB in a manner that diminishes and is directly contrary to the Board's established responsibilities, the Ninth Circuit's ruling raises an important issue of federal law that has not been, but clearly should be, settled by this Court.

Finally, the Ninth Circuit's decision further undermines federal labor policy by creating uncertainty and a lack of finality in the NLRB's election procedures. The NLRB's Rules and Regulations state that election objections must be filed within seven days, or they will not be considered. Here, no timely election objections were filed with the NLRB, which, in turn, certified the election's result. To permit an arbitrator to decide election objections months, and here years, after an NLRB election has already been certified does violence to the primary objective of Congress in enacting the NLRA, which was to achieve

stability of labor relations. Such a collateral arbitral attack on an already "final" election result necessarily creates uncertainty and fosters instability in the NLRB's election procedures. It is also in direct conflict with the heretofore well-established rule that the courts must refrain from exercising LMRA § 301 jurisdiction when representational matters have been *already decided* by the NLRB. As such, this petition should be granted so that this Court can address and rectify the Ninth Circuit's ruling that, if permitted to stand, will severely undermine federal labor policy.

## I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS RECOGNIZING THAT A DETERMINATION OF ELECTION OBJECTIONS IS WITHIN THE "PRIMARY JURISDICTION" OF THE NLRB

As declared by this Court, the "primary jurisdiction" doctrine provides that in "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over...." *International Bhd. of Boilermakers [etc.] v. Hardeman*, 401 U.S. 233, 238 (1971). Where the NLRB is concerned, "the doctrine of primary jurisdiction is a recognition of congressional intent to have matters of national labor policy decided in the first instance by the National Labor Relations Board." *United Ass'n of Journeymen v. Valley Engineers*, 975 F.2d 611, 613 (9th Cir. 1992).

Squarely within the NLRB's acknowledged "primary jurisdiction" are issues involved in the designation of an exclusive bargaining agent under § 9 ("representatives and elections") of the NLRA. As the circuit courts of appeals, including the Ninth Circuit, have repeatedly recognized, "representational issues [those pertaining to representatives and elections under NLRA § 9] fall within

the NLRB's primary jurisdiction." *Valley Engineers, supra*, 975 F.2d at 613. See also, *Pace v. Honolulu Disposal Service, Inc.*, 227 F.3d 1150, 1156 (9th Cir. 2000) ("representational issues are more appropriately resolved by the NLRB than by the courts, given the agency's superior expertise" (interior quotation marks and citation omitted); *Local Union 257, Intern. Broth. of Elec. Workers, AFL-CIO v. Sebastian Elec.*, 121 F.3d 1180, 1185 (8th Cir. 1997) ("[r]epresentational issues fall within the NLRB's primary jurisdiction").

While LMRA § 301, 29 U.S.C. § 185(a), provides federal court jurisdiction over "suits for violation of contracts between an employer and a labor organization," Section 301 jurisdiction sometimes conflicts with the NLRB's primary jurisdiction. In such a case, the circuit courts have held that if the matters at issue in the Section 301 litigation are "primarily representational," the NLRB's primary jurisdiction must be honored and the courts must continue to defer to the NLRB. See, *Pace, supra*, 227 F.3d at 1156-1157 (a district court loses jurisdiction where "the major issues to be decided ... can be characterized as primarily representational," rather than primarily contractual); *Local Union 204 of Int'l Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co.*, 668 F.2d 413, 418-19 (8th Cir. 1982) (same); *Communications Workers of Am. v. U.S. West Direct*, 847 F.2d 1475, 1479 n. 1 (10th Cir. 1988) (if case is "primarily representational," Section 301 jurisdiction is precluded); *United Bhd. of Carpenters, Local Union No. 1694 v. W.T. Galliher & Bros.*, 787 F.2d 953, 954 (4th Cir. 1986) (jurisdiction under Section 301 is precluded if the contractual dispute is "primarily representational").

While the Ninth Circuit in the decision below acknowledged that the courts must defer to the NLRB's primary jurisdiction where the major issue to be decided is "primarily representational," its decision nonetheless

constitutes a fundamental departure from existing law. Until the Ninth Circuit's decision below, both this Court and the other circuit courts of appeals had long recognized that the determination of *"election objections"* is a matter uniquely of an administrative nature within the NLRB's special expertise. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide degree of latitude in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees"); *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1123-1124 (7th Cir. 1975) (the NLRB is "entrusted with the responsibility of conducting elections and of supervising the conduct and actions of the parties therein concerned to insure a free, unfettered exercise of self-determination ..., [t]he conduct of representation elections is the very archetype of a purely administrative function, with no quasi about it ..."); *NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1559 (11th Cir. 1984) (the "[d]etermination of whether a union representation election was unfairly conducted and should be set aside is primarily a question for the National Labor Relations Board").

In exercising its "primary task of insuring an acceptable democratic labor election process," *NLRB v. Southern Health Corp. supra*, 514 F.2d at 1123, the NLRB has administratively established a broad standard, sometimes known as the "laboratory conditions" standard, to govern pre-election conduct by the parties to a representation election. The NLRB has described this standard, as well as its role in enforcing the standard, as follows:

> In election proceedings, it is the Board's function to provide a laboratory in which the experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of

> the employees. It is not only our duty to establish these conditions; it is also our duty to determine whether they have been fulfilled. When in the rare extreme case, the standard drops too low, because of our fault or the fault of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

*General Shoe Corporation*, 77 NLRB 124, 127 (1948). Not all wrongful conduct is sufficiently egregious to require a re-run election. *Caron International*, 246 NLRB 1120 (1979). The NLRB has stated that ultimate question to be decided under its laboratory conditions standard is "whether the conduct reasonably tends to interfere with the employee's freedom of choice." *Baja Place Inc.*, 268 NLRB 868 (1984). In evaluating whether employees can freely and fairly exercise their choice in a representation election, the NLRB will examine the "totality of the campaign circumstances," *SPX Corp.*, 320 NLRB 219, 222 (1995), including factors such as (1) the size of the voting unit; (2) the closeness of the election; (3) the number of objectionable incidents; and (4) the extent to which reports of the misconduct were disseminated to unit employees. *Rosehill Cemetery*, 275 NLRB 180 (1985). As the NLRB has recognized, what is unfair in one situation, may be fair in another, *Newport News Shipbuilding and Drydock Co.*, 239 NLRB 32 (1978), and the NLRB uses its administrative expertise to decide which is the case. *NLRB v. Southern Health Corp.*, *supra*, 514 F.2d at 1123 ("before resorting to the serious remedy of invalidating an election, with its attendant dangers of delay, administrative over-extension, and frustration of the goal of self-determination, the Board relies upon its experience and expertise in labor elections to determine, under all of the peculiar circumstances present, 'whether the conduct could reasonably be expected to have an impact on the election.'")

In finding that the SEIU's Complaint to Compel Arbitration of its election objections did not raise a "primarily representational" issue, the Ninth Circuit chose to characterize that Complaint as seeking nothing more than the arbitration of contractual "violations of the Agreement" (Pet. App. at 15a-17a). However, as noted, the Complaint sought "[a]n order compelling St. Vincent and DOCHS to arbitrate the dispute regarding SEIU's *objections to the September 26 and 27, 2001 election* (ER 4-5 emphasis added). The making of an "election objection" is the procedure by which a party seeks to invalidate the results of a representation election and obtain a "re-run" election. "The validity of an election may be questioned by filing objections to the conduct of an election or to conduct affecting the results of an election. ... Objections may have the effect of invalidating an election. If this occurs, the election may be 'rerun'..." Office of the NLRB General Counsel, *An Outline of Law & Procedure in Representation Cases* § 22-116 (1999). Where, as here, a party raises "objections" to an election, it is asserting that alleged pre-election misconduct prevented a free and fair choice in the election.[3]

While the SEIU's election objections involve claimed violations of the pre-election campaign limitations found in the Agreement, the determination of the SEIU's objections to such conduct allegedly affecting the results of the NLRB election was still a "primarily representational" matter.

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[3] While the SEIU claimed for the first time on appeal that it was supposedly not seeking to invalidate the results of the NLRB election, in deciding a Rule 12 motion to dismiss, the courts are obligated to base their ruling on the "four corners of the complaint" and *not* a party's revisionist attempt to recharacterize the complaint on appeal. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998). To the extent the Ninth Circuit in its Opinion at n. 7 (Pet. App. at 19a) adopted the SEIU's revisionist position; the court of appeal violated this fundamental rule.

The NLRB will consider as possible objectionable conduct to an NLRB-conducted election a party's failure to abide by a private agreement that limits pre-election conduct. *See, e.g., Tyler Pipe Industries, Inc.*, 180 NLRB 880, 881, 890 (1970) (finding that a party failed to abide by a private agreement limiting pre-election campaigning, but holding that the agreement's violation in that case was not of sufficient severity to preclude a free and uncoerced election).

As the NLRB's *Tyler Pipe* decision reflects, "election objections" are *not* resolved simply by determining whether any conduct occurred in violation of the four-corners of a party's contractual agreement limiting pre-election campaigning. Rather, objections to an NLRB election require an *additional* analysis of whether such conduct, even if it clearly violated the terms of a private agreement, was of such severity that a "free and fair choice" by voters was precluded. Again, under the *General Shoe* "laboratory conditions" standard the answer to that question requires an exercise of the NLRB's administrative expertise to determine at what point such a degree of misconduct has occurred that a new election must be ordered. As stated in *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 795 (7th Cir. 1991), "the Board utilizes its expertise to determine how much misconduct is too much misconduct to guarantee that the result of the election truly reflects the choice of the employees." Because the SEIU's election objections do *not* turn on whether the complained-of pre-election campaign conduct constitutes a violation of the contractual Agreement, but, rather, on whether that alleged conduct, if it occurred, unduly impacted the employees' right to vote freely and without coercion, the issue raised by the SEIU's election objections is "primarily representational" and not primarily contractual.

While the Ninth Circuit stated in its opinion that "[t]he interpretation of the Agreement in this case does not depend even partially on 'the question of whom the union represents'" (Pet. App. at 14a), that pronouncement fails to recognize that in permitting private arbitration of objections to the election conducted by the NLRB, the ultimate issue before the arbitrator will be whether the employees' vote in the NLRB election rejecting union representation should stand or be re-run.[4] Manifestly, that is an issue that is "primarily representational."

By authorizing an order compelling arbitration of objections to an NLRB-conducted election, the Ninth Circuit's ruling directly conflicts with the decisions of this Court and the other circuit courts that recognize that election objections raise not only a "representation issue," but one that uniquely requires an application of administrative expertise in order to determine when alleged misconduct is "too much misconduct" so that a new re-run election must be ordered. Not only does the Ninth Circuit's decision conflict with the pronouncements of this Court and create an inter-circuit conflict requiring clarification by this Court, but the Ninth Circuit's decision strikes at the heart

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[4] In reaching the erroneous conclusion that the SEIU's Complaint "raises no representational issue" (Pet. App. at 16a), the Ninth Circuit relied heavily on the fact that the Agreement provides the arbitrator may not "compel recognition of the Union where a majority of the voters have not selected representation by the Union." However, even if the arbitrator cannot issue the arbitral equivalent of an NLRB *Gissel* bargaining order (*see Gissel Packing Co. v NLRB*, 395 U.S. 575 (1969) (holding that for particularly egregious pre-election misconduct the NLRB may order an employer to recognize and bargain with a union without the need for a new election), that provision in the Agreement would not prevent an arbitrator from effectively invalidating the result of the NLRB election by ordering a re-run election. Indeed, during the appellate oral argument, the SEIU suggested that it believed that a new election would be a permissible arbitral remedy in answer to its election objections.

of the doctrine of NLRB primary jurisdiction. It not only countenances, but itself fosters, a prohibited "'end run' around provisions of the NLRA under the guise of contract interpretation," *Iowa Elec. Light & Power Co., supra*, 668 F.2d at 418, and by so doing, undermines the "strong policy in favor of using the procedures vested in the Board for representational determinations in order to promote industrial peace." *Id.*

## II. THE NINTH CIRCUIT DECISION UNDERMINES EXISTING FEDERAL LABOR POLICY AS IT ERRONEOUSLY DISREGARDS THE BINDING NATURE OF A NLRB STIPULATED ELECTION AGREEMENT

In voluntarily signing the NLRB "Stipulated Election Agreement," the SEIU expressly agreed that all post-election proceedings involving the NLRB-conducted election would "conform with the Board's Rules and Regulations" (SER 15). The NLRB's Rules and Regulations, in turn, clearly require that all post-election objections to conduct affecting an NLRB election be filed within seven days *with the NLRB* (29 C.F.R. § 102.69(a)), and that the *NLRB* will be the decisionmaker of any such objections (29 C.F.R. § 102.69(c)-(f)). Federal labor policy provides that a party's obligations under an NLRB Stipulated Election Agreement are binding on the party. As stated by the NLRB in *Grant's Home Furnishings, Inc.*, 229 NLRB 1305, n. 3 (1977):

> The [election] stipulation by its very terms provides for the parties' agreeing to certain matters and little would seem to be added by denominating the agreement a contract. Nevertheless, on occasion the Board has stated that an "agreement for consent election" - which is the same as a Stipulation for Certification [now called a

> Stipulated Election Agreement] except for certain rights of review – "is a contract ... binding upon the parties who have expressed their mutual assent thereto." [Citation omitted.] The point seems to be to emphasize that the parties are bound by the agreement, a conclusion that scarcely turns on the use of the word "contract." See, e.g., *NLRB v. The Standard Transformer Company*, 202 F.2d 846, 848-849 (C.A. 6, 1953), where the court in dealing with a stipulation for certification holds it, without use of the word "contract," to be "binding upon the parties according to its terms

The Ninth Circuit's decision mistakenly dismisses the binding effect of the NLRB Stipulated Election Agreement by asserting "the Union's allegations that the employer violated the Agreement arises out of the Agreement and not the Board's Rules and Regulations" (Pet. App. at 19a). However, the legal issue before the Ninth Circuit as raised by the SEIU's Complaint to Compel Arbitration of election objections was *not* whether there were violations of the Agreement's provisions regarding pre-election campaigning. Rather, the legal question was *who* (the NLRB or a private arbitrator) would decide whether such alleged violations impacted the NLRB election, when raised as post-election objections. The SEIU by signing the binding "Stipulated Election Agreement" expressly agreed that, irrespective of the source of their objections, it would be the *NLRB*.[5] It is

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[5] Not only did the SEIU agree in the NLRB Stipulated Election Agreement to file any post-election objections in accord with the NLRB's Rules and Regulations, but the parties' Agreement likewise confirmed that where an NLRB-conducted election was held, "the NLRB shall substitute for the role of the Election Officer, but all other aspects of the [Agreement's] recognition procedure shall apply, *except as adjustments may be required by the NLRB*" (emphasis added). The Ninth Circuit plainly erred in holding that the NLRB's Rules and Regulations do not require any adjustment in the Agreement's provisions that allow for

not up to an arbitrator to interpret the meaning and effect of a NLRB election stipulation; especially where the NLRB has already ruled in *Grant's Home Furnishing's, supra*, that NLRB election stipulations are binding on the parties that sign them. By permitting private arbitration of the SEIU's post-election objections to the NLRB election, the Ninth Circuit's decision wrongly provides for a result that directly contravenes the federal labor policy that holds that the terms of an NLRB Stipulated Election Agreement are binding on the parties that signed it.

Indeed, under the Ninth Circuit decision, the SEIU's choice to pursue an election through the NLRB's processes, rather than through the Agreement's private election mechanism, did nothing more than make the NLRB the parties' agent for the physical conduct of the election. The NLRB, however, has expressly rejected just such an attempt to restrict its role. In *Grant's Home Furnishings, supra*, 229 NLRB at 1306, the Board also declared:

> It is largely a matter of indifference, at least for purposes here, whether one chooses to call [an NLRB election stipulation] a contract or not, for, however described, the stipulation does not by some alchemy change what was initiated as a public proceeding under Section 9(c)(1) of the Act into some private arrangement between management and labor with the Board's role reduced to that of an organization engaged by these parties to conduct an election pursuant to their instructions and arrangements... . [T]he Board's rules, regulations, and pertinent decisional law are

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arbitration of all disputes arising under the Agreement (Pet. App. at 18a), as, again, the Board Rules and Regulations specifically require that *post-election objections* to a NLRB conducted election must be filed with, and ruled on, by the NLRB itself, and not some other person such as a private arbitrator. (29 C.F.R. § 102.69).

> the same for stipulated elections as for Board-directed elections. One of the consequences of the foregoing is that complaints concerning an election must, if they are to have lawful effect, be raised *by properly filed objections at the postelection stage of the proceeding*; and, as the Board has held, the standards applied in judging alleged objectionable conduct in stipulated proceedings are the same as those applied in Board-directed proceedings. ... (Emphasis added)

As the effect of the Ninth Circuit's ruling is to fundamentally redefine the role of the NLRB in a manner that diminishes, and is directly contrary, to the NLRB's established responsibilities, the court of appeals decision calls for an exercise of this Court's supervisory power to reaffirm the NLRB's proper role in the administration of national labor policy.

## III. BY PERMITTING A LATER COLLATERAL ATTACK ON THE ALREADY "CERTIFIED" RESULTS OF AN NLRB ELECTION, THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY UNDERMINES THE FINALITY OF THE NLRB'S ELECTION PROCESSES

As stated in *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Facetglas, Inc.*, 845 F.2d 1250, 1252 (4th Cir. 1988):

> There is a strong policy in favor of using the procedures vested in the Board for representational determinations in order to promote industrial peace and "[t]o fail to apply this policy to section 301 actions would allow an a prohibited "'end run' around provisions of the NLRA under the guise of contract interpretation." *Local Union 204, Int'l*

*Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co.*, 668 F.2d 413, 418-19 (8th Cir.1982).

By permitting the arbitration of election objections that were never filed with the NLRB, the Ninth Circuit decision authorizes just such an "end run" around the provisions of the NLRA. The Ninth Circuit's ruling erroneously and all too blithely dismisses the SEIU's complete failure to file any timely election objections with the NLRB – even though NLRB's Rules and Regulations state that election objections must be filed within seven days, or they will not be considered (29 C.F.R. § 102.69(b), see also NLRB Case-Handling Manual, Part II, ¶11392.3 (SER 125)).[6] Moreover, by allowing the SEIU's election objections to be heard by an arbitrator, despite the election's result having already been "certified" by the NLRB, the Ninth Circuit's decision directly conflicts with federal labor policy as intended by Congress. As stated in *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49, 55 (5th Cir. 1963):

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[6] The timeliness issue raised by the SEIU's failure to file its election objections in a timely manner with the NLRB concerns the *NLRB's seven day timeliness requirement* as found in the Board's Rules and Regulations, 29 U.S.C. § 102.69(a). While the Ninth Circuit's decision cites to cases that hold the timeliness of contractual grievances is for an arbitrator to decide (*e.g.*, *Retail Delivery Drivers, Local 588 v. Servomation Corp.*, 717 F.2d 475 (9th Cir. 1983) (Pet. App. at 20a), here, the NLRB's seven-day limitation for filing election objections is set by the NLRB's Rules and Regulations, not the parties' Agreement. While an arbitrator can decide contractual timeliness issues, it is an improper invasion of the NLRB's primary authority over enforcement of its own Rules and Regulations governing representation proceedings to entrust an arbitrator with interpretation and enforcement of the *NLRB's procedural rules*. Here, by certifying the results of the election the NLRB has already found that no timely objections were filed. The Ninth Circuit erred in failing to give that finding substantial deference. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (courts "must give substantial deference to an agency's interpretation of its own regulations").

> The primary objective of Congress in enacting the National Labor Relations Act was to achieve stability of labor relations. [Citation] To introduce a doctrine that would subject "final" elections to collateral attack would, we believe, do violence to that primary objective. It does not appear illogical to require a party seeking to set aside the result of a Board-conducted election to adhere to rules, such as the one here involved requiring objections to be filed within 5 [now 7] days, promulgated by the Board for the purpose of encouraging the desirable objective of stability and finality.

As the NLRB has itself stated, to "leave open to continual questioning the validity of a Board certification, once properly issued, ... necessarily would create uncertainty and a lack of finality in [the Board's] election procedures." *Reichart Furniture Co.*, 236 NLRB 1698 (1978). The Ninth Circuit's decision, which fosters such uncertainty and lack of finality more than two years after the election result in this case was "certified" and "closed" by the NLRB, plainly constitutes an obstacle to the Congressional objective of achieving stability in labor relations.

Finally, in allowing a collateral arbitral attack on an already certified and closed election proceeding, the Ninth Circuit's decision also violates the general rule that in striking a balance between the NLRB's primary jurisdiction and a trial court's concurrent authority under § 301, the courts should decline to assert jurisdiction where the NLRB has *already made* a determination made in a representation matter. As noted in, *Iowa Elec. Light & Power Co.*, *supra*, 668 F.2d at n. 11:

> courts have consistently refused to order arbitration where the Board had previously resolved the dispositive representational issue. *See,*

> *e.g., Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1, 10 (7th Cir. 1969); *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352, 358 (2d Cir. 1966), *cert. denied*, 384 U.S. 988 (1966). *See also Carey v. Westinghouse Elec. Corp.*, 375 U.S. [261,] 272 [(1964)]. When the Board issues an order determining the dispositive representational issue, no contractual issues remain to be decided through arbitration or bargaining. *Smith Steel Workers*, *supra*.

Here, by certifying the results of the election, the NLRB already ruled on and disposed of the representational issue raised the SEIU's claim that St. Vincent Medical Center had allegedly engaged in objectionable pre-election campaign conduct impacting the election. That earlier representation decision by the NLRB should have been deferred to by the Ninth Circuit, and should have been found to preclude any exercise of LMRA § 301 jurisdiction over this representation dispute.

## CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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January 29, 2004

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

Service Employees International Union; Service Employees International Union, Local 399,
*Plaintiffs-Appellants,*

v.

No. 02-56058
D.C. No. CV-02-02740-R
OPINION

St. Vincent Medical Center; Daughters of Charity Health Systems, Inc.,
*Defendants-Appellees.*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
April 8, 2003–Pasadena, California

Filed September 19, 2003

Before: Harry Pregerson, A. Wallace Tashima, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Pregerson

**SUMMARY**

**Labor and Employment/Arbitration**

The court of appeals reversed a judgment of the district court. The court held that when the heart of a case involving the arbitrability of alleged violations ~~of a union~~-

employer agreement is a contractual rather than representational dispute, the doctrine of primary jurisdiction does not prevent a district court from compelling arbitration of alleged violations of the agreement governing the parties' conduct during an organizing drive.

Appellants Service Employees International Union (SEIU) and Service Employees International Union, Local 399 (collectively the Union) filed a complaint in district court to compel arbitration after appellees St. Vincent Medical Center and the Daughters of Charity Health Systems, Inc. (DOCHS) refused to arbitrate a dispute that the Union claimed was a violation of an agreement between the Union and the Employer. The Agreement provided that the Union and the Employer would work together to advance common concerns, and would not engage in personal attacks or derogatory comments concerning the basic mission of their respective organizations. The Employer agreed to communicate only that which was factual and not to initiate one-on-one conversations with employees about unionization. The Union contended that during the course of its organizing campaign, the Employer did not comply with the Agreement's mandated restrictions on the Employer's conduct. The Employer moved to dismiss, arguing that the district court lacked subject matter jurisdiction because the complaint raised a purely representational matter over which the National Labor Relations Board (NLRB) possessed primary jurisdiction and thus was not subject to the court's jurisdiction under § 301 of the Labor Management Relations Act (LMRA). The district court agreed and ordered that the Union's complaint to compel arbitration be dismissed in its entirety with prejudice.

The Union appealed.

[1] Section 301 of the LMRA vests federal courts

with jurisdiction over cases involving the violation of private labor agreements. Although district courts have concurrent jurisdiction with the NLRB over such cases, federal courts must tread lightly in areas of the NLRB's primary jurisdiction and must defer to the NLRB when, on close examination, § 301 cases fall within the NLRB's primary jurisdiction.

[2] To determine whether a case is within the NLRB's primary jurisdiction, courts have drawn the jurisdictional line by asking whether the major issues to be decided can be characterized as primarily representational or primarily contractual. It had to be concluded that the major issue to be decided – the arbitrability of the alleged violations of the Agreement – was primarily contractual. The interpretation of the Agreement did not depend even partially on the question of whom the union represented. Rather, the interpretation of the Agreement depended on whether the arbitration clause in the Agreement was susceptible to an interpretation that covered the asserted dispute. Although this case concerned alleged violations of the Agreement's restrictions on the parties' behavior during an organizing drive before a representational election, the major issue could not be characterized as primarily representational. A case does not fall on the NLRB's primary jurisdiction side of the jurisdictional line merely by having representational overtones.

[3] The district court would merely be required to determine whether the arbitration clause in the Agreement was susceptible of an interpretation that covered the asserted dispute, and if so to compel arbitration. It had to be concluded that while this case concerned allegations regarding the parties' behavior before a representational election, and thus has representational overtones, compelling arbitration of the alleged violations of the Agreement raised no representational issue.

[4] The presence of the NLRB does not place all issues of a case within the NLRB's primary jurisdiction. Instead, a court still must ask whether the major issues to be decided can be characterized as primarily representational or primarily contractual. The major issue in this case-the arbitrability of alleged violations of the Agreement – was contractual. Therefore, it had to be held that the district court had jurisdiction to compel arbitration of alleged contractual violations under § 301 of the LMRA.

[5] Where the contract contains an arbitration clause, there is a presumption of arbitrability. [6] The presumption of arbitrability applied in this case because the arbitration clause was susceptible to an interpretation that covered the asserted dispute. [7] It had to be held that under Supreme Court law and the law of the Ninth Circuit, the Union stated a claim for which relief could be granted, namely that the district court should compel arbitration under the Agreement based on the Employer's alleged violations of the Agreement. [8] Accordingly the district court's order dismissing the Union's complaint to compel arbitration had to be reversed and the case remanded for entry of an order compelling arbitration of the alleged contractual violations.

## COUNSEL

Benjamin Sachs, Staff Attorney, SEIU, Washington, D.C., for the plaintiffs-appellants.

Philip L. Ross, Littler Mendelson, PC, San Francisco, California, for the defendants-appellees.

## OPINION

PREGERSON, Circuit Judge:

At issue in this case is the arbitrability of alleged

violations of an agreement between Plaintiffs-Appellants Service Employees International Union ("SEIU") and Service Employees International Union, Local 399 ("SEIU Local 399") (collectively "the Union") and Defendants-Appellees St. Vincent Medical Center and the Daughters of Charity Health Systems, Inc. ("DOCHS") (collectively "the Employer"). The National Labor Relations Board ("NLRB") conducted a representational election at St. Vincent Medical Center. The Union lost the election. The Union then alleged that the Employer violated various provisions of an agreement that restricted the parties' behavior during union organizing campaigns. Specifically, the Union contended that during the union organizing drive at St. Vincent Medical Center, the Employer committed eighteen acts in direct violation of the agreement, including encouraging workers to vote against unionization, giving support and assistance to anti-union workers, unreasonably restricting access to conference rooms, interrogating workers about their support for the union, and making inflammatory religious appeals to employees. Pursuant to the agreement, the Union sought to arbitrate these alleged violations. When the Employer refused to arbitrate, the Union filed a complaint with the district court to compel arbitration. In response, the Employer filed a motion to dismiss the complaint arguing, in part, that the Union's complaint dealt with "a purely representational matter" and thus the district court lacked jurisdiction under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The district court granted the Employer's motion to dismiss the Union's complaint and dismissed the Union's complaint to compel arbitration in its entirety, with prejudice.

We conclude that the dispute before us is primarily contractual, not representational. We further conclude that the arbitration clause in the agreement is susceptible of an interpretation that covers the present dispute. We, therefore, reverse the district court's order dismissing with

prejudice the Union's complaint to compel arbitration.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The Union and Catholic Healthcare West ("CHW") signed an agreement ("the Agreement") on April 4, 2001.[1] CHW entered into the Agreement on behalf of itself and its facilities, including St. Vincent Medical Center. The Agreement stated that the parties had "decided to undertake a new approach to providing quality care for patients and quality jobs for health care employees." Through the Agreement, the parties committed themselves "to a process that resolves issues between us in a manner that not only reduces conflict, but also fosters a growing appreciation for our respective missions."[2]

The Agreement provided that the Union and CHW would work together to advance common concerns, such as a commitment to quality, accessible health care, and would not "engage in personal attacks or derogatory comments concerning the basic mission of their respective organizations." Pertinent to the appeal before this court, the Agreement also provided Guidelines and a New Recognition Procedure: "The parties agree[d] that the following commitments and recognition procedure will govern with respect to organizing and recognition processes at all

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[1]CHW transferred its interest in St. Vincent Medical Center to the DOCHS, on or about January 1, 2002; CHW is not a party in these proceedings. In an agreement with CHW, DOCHS agreed to be bound by the above mentioned Agreement between the Union and CHW.

[2]The Union notes in its brief that "[t]he Agreement at issue here reflects the parties' recognition that, despite the National Labor Relations Board's ('NLRB's' or 'Board's') efforts to regulate the process, union organizing campaigns are too often marred by 'bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortion.'" (quoting *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 58 (1966)).

existing... CHW facilities [including St. Vincent Medical Center]." The Guidelines, setting forth the rules that would govern the parties' conduct during an organizing drive, stated that:

> 1. CHW and SEIU agree that employees shall be entitled to make a decision regarding union representation free from coercion, intimidation, promises, or threats.
>
> 2. CHW and SEIU agree that their representatives will communicate only that which is factual...
>
> 3. CHW representatives will not inform or imply to eligible voters that they will lose benefits, wages or be subject to less favorable working conditions by unionizing.
>
> 4. CHW agrees that its communication with employees regarding unionization shall take place through literature or in group meetings and that its supervisors and managers shall not initiate one-onone conversations with employees about unionization...
>
> 5. Employee participation in any group meeting for the primary purpose of discussing unionization shall be voluntary.
>
> 6. No employee shall have his/her right to determine whether or not to be represented by a Union abridged in any manner by reason of his/her citizenship or immigration status...

The Agreement set forth a procedure run by a jointly selected Election Officer for a secret ballot election to

determine the employees' preference regarding union representation. Under the Agreement, however, the Union had the option to "petition the NLRB for an election under the same rules in [the Agreement's] recognition procedure. In such situation, the NLRB shall substitute for the role of the Election Officer, but all other aspects of the recognition procedure shall apply, except as adjustments may be required by the NLRB" ("the NLRB election option"). The Agreement further provided that "disputes under this Agreement, including the Guidelines and Recognition Procedure will be resolved according to the Mediation and Arbitration provision in this Agreement."[3]

After the Agreement was executed, the Union embarked on an organizing drive at St. Vincent Medical Center. The Union contends that during the course of the union organizing campaign, the Employer did not comply with the Agreement's mandated restrictions on the Employer's conduct.

Consistent with the terms of the Agreement, the Union elected to invoke the NLRB election option. On September 7, 2001, the Union signed a stipulation agreeing that the NLRB would conduct the secret ballot election on

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[3]The arbitration provision states:

> **Arbitration**: Except as otherwise provided herein, the Parties agree to submit any unresolved disputes about compliance with or construction of this Agreement for final and binding resolution by an Arbitrator selected through the American Arbitration A[ssociation] (AAA) Special Panel or by mutual agreement... As part of his/her decision, the Arbitrator shall have the discretion to order remedy to resolve the dispute. However, in no case, may the Arbitrator or Election Official compel recognition of the Union where a majority of the voters have not selected representation by the Union.

September 26 and 27, 2001. According to the stipulation, the "terms and conditions as contained in the Stipulated Election Agreements previously executed by the parties in these matters shall still apply." Under the Stipulated Election Agreement signed by the Union and the Employer in 2000, "postelection and runoff procedures" after the ballots were counted would conform to the NLRB's Rules and Regulations.

The NLRB conducted an election at St. Vincent Medical Center on September 26 and 27, 2001. The Union lost; the NLRB issued a Tally of Ballots on September 27, 2001, showing that a majority of the valid votes plus challenged ballots had not been cast for the Union. On October 16, 2001, the NLRB certified the election results: "It is certified that a majority of the valid ballots have not been cast for any labor organization and that no labor organization is the exclusive representative of these employees in the bargaining unit described below."

On October 2, 2001, the Union sent a letter via fax to CHW. The letter charged CHW with committing eighteen violations of the Agreement during the Union's organizing drive at St. Vincent Medical Center. The alleged violations included:

> 2. CHW, acting through its agents, violated Section II.C.9 of the Agreement by encouraging workers to vote against unionization.
>
> 3. CHW, acting through its agents, violated Section II.C. of the Agreement by having its supervisors wear anti-union buttons.
>
> . . . .
>
> 5. CHW, acting through its agents, violated

the Agreement by granting more favorable working conditions to employees on the "Vote No" committee, and by granting less favorable working conditions to open union supporters.

. . . .

8. CHW, acting through its agents, violated Section II.C.2 and II.C.9 of the Agreement by posting information about unions (and specifically SEIU Local 399) that was not factual.

. . . .

10. CHW, acting through its agents, violated Section II.C.1 of the Agreement by threatening workers with loss of benefits in order to discourage them from voting to unionize.

11. CHW, acting through its agents, violated Section II.C.5 of the Agreement by holding mandatory group meetings with workers regarding unionization.

12. CHW, acting through its agents, violated Section II.C.1 of the Agreement by interrogating workers about their support for the union.

. . . .

16. CHW, acting through its agents, violated the Agreement by making inflammatory religious appeals to employees.

On December 20, 2001, the Union sent a letter to CHW and DOCHS regarding the transfer of governance of seven CHW hospitals, including St. Vincent Medical Center, to DOCHS. The letter stated that based on previous conversations, the Union understood that "DOCHS will take over CHW's obligations, if any, with respect to any outstanding legal claim (such as litigation, ULP or arbitration matter) regarding labor relations at DOCHS facilities, including, but not limited to, the Union's pending objections/arbitration over the St. Vincent Hospital election."

On January 3, 2002, counsel for DOCHS responded to the Union's letter and agreed that "effective January 1, 2002 the Daughters of Charity Health Systems (DOCHS) hospitals... inherit[ ] the labor relations situation and obligations at that specific hospital as of January 1, 2002." The letter, however, stated that:

> concerning St. Vincent Medical Center and the National Labor Relations Board election in the unit involving the service and maintenance employees, I am advised that no timely objections were ever filed with the [NLRB]. I am further advised that no request for arbitration has been made regarding any purported objections to the election. Accordingly, no valid objections to the NLRB election exist.

In response, on January 16, 2002, the Union sent a letter to DOCHS stating that "SEIU has the right to submit the St. Vincent election objections, which were filed under the April 4, 2001 Agreement, to arbitration under that Agreement's arbitration clause. Please consider this letter to be a reaffirmation that SEIU wishes to submit this unresolved dispute to arbitration."

In a letter dated January 24, 2002, DOCHS replied and refused the Union's request for arbitration, asserting that the Agreement did not apply to the election because the NLRB – and not a private election officer – ran the election.

On April 3, 2002, the Union filed a complaint to compel arbitration in the United States District Court for the Central District of California arguing that the refusal of the Employer to arbitrate the dispute was a violation of the Agreement. The Union stated that the district court had jurisdiction under § 301 of the LMRA. The Union sought an order compelling the Employer "to arbitrate the dispute regarding SEIU'S objections to the September 26 and 27, 2001 election."

On May 13, 2002, the Employer filed a motion to dismiss the Union's complaint pursuant to Fed. R. Civ. P. 12(b)(l) and 12(b)(6). The Employer argued that the district court lacked subject matter jurisdiction because the complaint raised a purely representational matter over which the NLRB possessed primary jurisdiction and thus was not subject to the court's jurisdiction under § 301 of the LMRA. The Employer further argued that the Union's complaint failed to state a claim upon which relief could be granted because "[a]s a matter of law, [the Union is] not entitled to have untimely election objections to an NLRB-conducted election heard and decided by an arbitrator."

"After considering all papers submitted and oral argument heard and for good cause appearing," the district court, Honorable Manuel L. Real presiding, granted the Employer's motion without further explanation. The district court ordered that the Union's complaint to compel arbitration be dismissed in its entirety with prejudice. The Union now appeals.

## II. DISCUSSION

To determine whether the district court erred in granting the Employer's motion to dismiss we must decide whether the district court had jurisdiction under § 301 of the LMRA and whether the Union stated a claim upon which relief could be granted.[4] Because we find that "[t]he heart of the case is a contractual rather than representational dispute," *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1152 (9th Cir. 2000), we hold that the doctrine of "primary jurisdiction" does not prevent the district court from compelling arbitration of alleged violations of the Agreement governing the parties' conduct during an organizing drive. Therefore, the district court has jurisdiction under § 301 of the LMRA.

The fact that the NLRB conducted the election at St. Vincent Medical Center or certified the election results does not prevent the district court from compelling arbitration of the alleged contractual violations. The Agreement states that "disputes under this Agreement, including the Guidelines and Recognition Procedure, will be resolved according to the Mediation and Arbitration provision in this Agreement;" the arbitration clause provides that "the Parties agree to submit any unresolved disputes about compliance with or construction of this Agreement for final and binding resolution by an Arbitrator." We therefore hold that because the arbitration clause in the Agreement is "susceptible of an interpretation that covers the asserted dispute," *AT&T Techs., Inc. v. Communication Workers of Am.*, 475 U.S. 643, 650 (1986), the Union stated a claim upon which relief can be granted. The district court erred in not compelling arbitration of the alleged contractual violations.

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[4]This court reviews de novo the grant of a motion to dismiss. *Inland-boatmens Union of the Pac. v. Dutra Group*, 279 F.3d 1075, 1078 (9th Cir. 2002).

## A. The district court erred in determining it lacked subject matter jurisdiction

[1] Section 301 of the LMRA vests federal courts with jurisdiction over cases involving the violation of private labor agreements: "Suits for violation of contracts between an employer and a labor organization... may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a). Although district courts have concurrent jurisdiction with the NLRB over such cases, federal courts "must tread lightly" in areas of the NLRB's primary jurisdiction and must defer to the NLRB "when, on close examination, section 301 cases fall within the NLRB's primary jurisdiction." *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 342 v. Valley Eng 'rs,* 975 F.2d 611, 613-14 (9th Cir. 1992).

[2] To determine whether a case is within the NLRB's primary jurisdiction, "we have drawn the jurisdictional line by asking 'whether the major issues to be decided... can be characterized as primarily representational or primarily contractual.' " *Pace*, 227 F.3d at 1157 (quoting *Valley Eng'rs*, 975 F.2d at 614). We conclude that the major issue to be decided in this case – the arbitrability of the alleged violations of the Agreement – is primarily contractual. Unlike *Valley Eng 'rs*, in which we found that the case was "primarily representational," the interpretation of the Agreement in this case does not "depend[ ] entirely on the resolution of the question of whom the union represents." 975 F.2d at 614 (quoting *Cappa v. Wiseman*, 659 F.2d 957, 960 (9th Cir. 1981) (Fletcher, J., dissenting)). The interpretation of the Agreement in this case does not depend even partially on "the question of whom the union represents." *Id.* Rather, the interpretation of the Agreement depends on whether

the arbitration clause in the Agreement is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650. Although this case concerns alleged violations of the Agreement's restrictions on the parties' behavior during an organizing drive before a representational election, the major issue cannot be characterized as primarily representational. A case does not fall on the NLRB's primary jurisdiction side of the jurisdictional line merely by having "'representational' overtones." *Pace*, 227 F.3d at 1157.

[3] Although the Agreement in this case is not labeled a "neutrality agreement,"[5] the Agreement is similar in many regards to the "employer neutrality" clause in *Hotel and Restaurant Employees Union v. Marriott Corp.*, 961 F.2d 1464, 1469 (9th Cir. 1992). In *Marriott*, we held that the district court had jurisdiction under § 301 over the neutrality clause because "[e]nforcement of the neutrality clause raises no representational issues." *Id.* Like the "employer neutrality" clause in *Marriott*, the contested portion of the Agreement in this case governs and restricts the parties' actions during an organizing drive. While the hotel in *Marriott* agreed not to express any opinion on whether its employees should choose the union as their exclusive bargaining representative, here, the Employer agreed to communicate only that "which is factual" and "not [to] initiate one-on-one conversations with employees about unionization." Just as in *Marriott*, the district court in the present case will not be required to "designate... an exclusive bargaining agent" or "identify... an appropriate collective bargaining unit." *Id.* (quoting *Local No. 3-193 Int'l Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1298 (9th Cir. 1980)). Nor will the district court be required

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[5] *See* Charles I. Cohen, *Neutrality Agreements*, 16 Lab. Law. 201 (2000); George N. Davies, *Neutrality Agreements: Basic Principles of Ertforcement and Available Remedies*, 16 Lab. Law. 215 (2000).

to "resolve any other representational issues not already resolved by the parties." *Id.* Rather, the district court in the present case would merely be required to determine whether the arbitration clause in the Agreement is "susceptible of an interpretation that covers the asserted dispute," and if so to compel arbitration. *Dutra Group*, 279 F.3d at 1078. Compelling arbitration of the alleged contractual violations will not require the naming of an exclusive bargaining agent or a collective bargaining unit. *Marriott*, 961 F.2d at 1469 (quoting *Ketchikan Pulp Co.*, 611 F.2d at 1298). The Agreement clearly states that "in no case, may the Arbitrator... compel recognition of the Union where a majority of the voters have not selected representation by the Union." We therefore conclude that while this case concerns allegations regarding the parties' behavior before a representational election, and thus has representational overtones, compelling arbitration of the alleged violations of the Agreement – like the enforcement of the neutrality clause in *Marriott* – "raises no representational issue." *Id.* at 1469.[6] Rather, "[t]he heart of th[is] case is a contractual rather than representational dispute." *Pace*, 227 F.3d at 1152.

[4] The Employer, however, argues that this case is entirely distinguishable from *Marriott*, because here the Union chose an NLRB-conducted election; the NLRB was not involved in *Marriott*. The Employer argues that once the Union chose the NLRB election option, any dispute

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[6]We recognize that our conclusion would be different if the Union had challenged the outcome of the election before this court, and not alleged violations of a contract: "Indeed, we have warned that 'end run[s] around Section 9 of the [National Labor Relations] Act... under the guise of contract interpretation... cannot be countenanced.'" *Pace*, 227 F.3d at 1157 (quoting *Ketchikan Pulp*, 611 F.2d at 1299-1300). We further have "recognized repeatedly that courts must refuse to exercise jurisdiction over claims involving representational issues." *Marriott*, 961 F.2d at 1468.

following the election became a "representational issue" under the primary jurisdiction of the NLRB. We disagree. The presence of the NLRB does not place all issues of a case within the NLRB' s primary jurisdiction. Instead, the court still must ask "whether the major issues to be decided... can be characterized as primarily representational or primarily contractual." *Pace*, 227 F.3d at 1157 (quoting *Valley Eng'rs*, 975 F.2d at 614). We have already answered that question and found that the major issue in this case – the arbitrability of alleged violations of the Agreement – is contractual. Therefore, we hold that the district court has jurisdiction to compel arbitration of alleged contractual violations under § 301 of the LMRA.

### B. The district court erred in finding that the Union failed to state a claim upon which relief can be granted

[5] In *Dutra Group*, we recently reiterated a general principle of labor law stating a strong preference for the arbitration of labor-management disputes:

> Where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

*Dutra Group*, 279 F.3d at 1078 (quoting *AT&T Techs.*, 475 U.S. at 650).

Notwithstanding this presumption of arbitrability when a labor-management agreement contains an arbitration clause, as the present Agreement does, the

Employer contends that the district court was correct in granting the Employer's motion to dismiss under Fed. R. Civ. P. 12(b)(6) – failure to state a claim upon which relief can be granted. The Employer argues that because the NLRB has already "certified" the results of the election, it is "improper for a federal court to permit a re-opening of the representation proceeding through the guise of permitting *an arbitrator* to decide untimely election objections." But as we stated above, the issue before us is not "the question of whom the union represents," *Valley Eng'rs*, 975 F.2d at 614, or any other representational issue. Rather, the issue is the arbitrability of the alleged violations of the Agreement.

[6] We find that the presumption of arbitrability applies in this case because the arbitration clause is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650. The Agreement states that "disputes under this Agreement, including the Guidelines [governing the parties' behavior during organizing campaigns] and Recognition Procedure, will be resolved according to the Mediation and Arbitration provision in this Agreement." The arbitration clause provides that "the Parties agree to submit any unresolved disputes about compliance with or construction of this Agreement for final and binding resolution by an Arbitrator." Furthermore, the Agreement states that under the NLRB election option, "the NLRB shall substitute for the role of the Election Officer, but *all other aspects of the recognition procedure shall apply*, except as adjustments may be required by the NLRB." (emphasis added). There is no evidence that the NLRB required any "adjustments" to the Agreement governing the parties' behavior during the organizing drive or to the parties' contractual obligation to arbitrate disputes "about compliance with or construction of this Agreement."

The Employer, however, contends that the Agreement does not cover any objections to the election[7] because the NLRB conducted the election and all objections needed to be brought according to NLRB procedure. To support its argument, the Employer points to the stipulation signed by the Union on September 7, 2001, agreeing that the NLRB would conduct the secret ballot election. The September 7, 2001 stipulation referred to a previous "Stipulated Election Agreement" signed by the parties in 2000, in which "postelection and runoff procedures... after the ballots are counted shall conform with the Board's Rules and Regulations." If the Union were objecting to the validity of the NLRB-conducted election, as the Employer claims, then such "postelection procedure" would have to conform to the NLRB's Rules and Regulations. But the Union's allegations that the Employer violated the Agreement arises out of the Agreement and not the NLRB's Rules and Regulations. Even assuming, arguendo, that the Employer is correct that the Union became bound by the NLRB's rules and procedures when it opted for an NLRB election, there is a valid argument that the arbitration clause covers the asserted dispute concerning the Employer's violations of the Agreement. "Doubts should be resolved in favor of coverage." *AT&T Techs.*, 475 US. at 650.

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[7]The parties dispute whether the Union is contesting "objections to the election," "election objections," or "violations of our Agreement." Regardless of the technical label, the Union is objecting to the behavior of the Employer in violation of the Guidelines that the parties agreed upon to govern their conduct during the organizing and pre-election drive. The Union's request in its complaint that the district court compel arbitration of "the dispute regarding SEIU's objections to the September 26 and 27, 2001 election," is not "*fatal* to its argument that it is supposedly not raising a representational issue" as the Employer contends. Reading the complaint, it appears that the Union is not objecting to the end result of the election, or attempting to invalidate the results of the election. But rather, the Union is attempting to arbitrate "[t]hese objections [that] consisted of a series of allegations that Catholic Healthcare West, St. Vincent, and DOCHS violated the Agreement."

Likewise, the Employer's other argument as to why the district court was correct in finding that the Union did not state a claim upon which relief can be granted is not persuasive. The issue whether the Union timely filed the alleged violations of the agreement is an issue left to the arbitrator, not this court. *See Retail Delivery Drivers, Local 588 v. Servomation Corp.*, 717 F.2d 475, 478 (9th Cir. 1983); *United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[J]udicial inquiry... must be strictly confined to the question whether the reluctant party did agree to arbitrate.").

[7] Therefore, we hold that under Supreme Court law and the law of this circuit, the Union stated a claim for which relief may be granted, namely that the district court should compel arbitration under the Agreement based on the Employer's alleged violations of the Agreement.

## CONCLUSION

[8] Accordingly, we REVERSE the district court's order dismissing the Union's complaint to compel arbitration and REMAND for entry of an order compelling arbitration of the alleged contractual violations.

REVERSED and REMANDED.

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

[DATE STAMP]
**FILED**
NOV 05 2003
CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

Service Employees International Union; Service Employees International Union, Local 399,
Plaintiffs-Appellants,

v.

St. Vincent Medical Center; Daughters of Charity Health Systems, Inc.,
Defendants-Appellees.

No. 02-56058

ORDER

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny defendants-appellees' petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing en banc is denied.

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CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

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JUN-4 2002
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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SERVICE EMPLOYEES INTERNATIONAL UNION, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,

Plaintiffs,

v.

ST. VINCENT MEDICAL CENTER and DAUGHTERS OF CHARITY HEALTH SYSTEMS, INC.,

Defendants.

Case No. 02-2740 R (RZx)
Assigned for all purposes to the Judge Manuel L. Real
Dept. 8
Date Filed: April 3, 2002

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT TO COMPEL ARBITRATION WITH PREJUDICE**

**[Fed.R.Civ.P. 12(b)(1) and 12 (b)(6)]**

Date: June 3, 2002
Place: Dept. 8
Time: 10:00 a.m.

_√_ Docketed
_√_ Copies / NTC Sent
_√_ JS - 5 / JS - 6
___ JS - 2 / JS - 3
___ CLSD

On June 3, 2002, in Department 8 of the above-entitled court, Defendants ST. VINCENT MEDICAL CENTER and DAUGHTERS OF CHARITY HEALTH SYSTEMS, INC.'s (collectively "Defendants") Motion To Dismiss Complaint To Compel Arbitration came on regularly for hearing in the above-captioned matter. After considering all papers submitted and oral argument heard and for good cause appearing,

IT IS THEREFORE ORDERED that Defendants' Motion be and hereby is GRANTED and that Plaintiffs SERVICE EMPLOYEES INTERNATIONAL UNION, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399's Complaint To Compel Arbitration be dismissed in its entirety with prejudice.

Dated: June 3, 2002

/s/
U.S. District Court Judge

(2)

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

No. 03-1083

IN THE

# Supreme Court of the United States

ST. VINCENT MEDICAL CENTER; DAUGHTERS OF CHARITY HEALTH SYSTEMS, INC.,
*Petitioners*,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the court of appeals correctly determine that the district court had jurisdiction to enforce the parties' contractual agreement to arbitrate disputes regarding an alleged breach of the parties' agreement?

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IN THE

# Supreme Court of the United States

No. 03-1083

ST. VINCENT MEDICAL CENTER; DAUGHTERS OF CHARITY HEALTH SYSTEMS, INC.,
*Petitioners*,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

## STATEMENT

The issue resolved by the court of appeals in this case is the arbitrability of disputes arising out of a private labor agreement. The Petitioner, St. Vincent Medical Center ("Petitioner" or "Employer"), and Respondent, Service Employees International Union ("Respondent" or "Union"), contractually agreed to abide by certain ground rules during organizing campaigns, and agreed that disputes over compliance with these restrictions would be submitted to arbitration.

Following a representation election conducted by the National Labor Relations Board ("NLRB" or "Board"), the Union alleged that the Employer's conduct during the organizing campaign violated the parties' agreement, and sought to arbitrate these violations. The court of appeals held

that because the Union's allegations concerned only contractual violations of the parties' agreement, the Union was entitled to an order compelling arbitration.

In arguing for a grant of *certiorari*, Petitioner miscasts and mischaracterizes the court of appeals' holding. Contrary to Petitioner's contention, the Union did not attack the results of the Board-conducted election, and the court of appeals did not compel arbitration of challenges to the results of that election. Indeed, the court of appeals' holding confirms, as all parties agree, that a suit brought under § 301 of the Labor Management Relations Act is not the proper vehicle for challenging the results of an NLRB election.

The court of appeals' conclusion that the district court had jurisdiction to order arbitration of a contractual dispute regarding pre-election conduct is wholly consistent with the clear law of this Court and with circuit court precedent. Indeed, the two circuits that have examined the question presented here reached the same conclusion: that the district court had jurisdiction to enforce the agreements at issue and that the Union was entitled to an order compelling arbitration. No court of appeals has ever reached a contrary result. The petition should be denied.

## ARGUMENT

### I. THE NINTH CIRCUIT PROPERLY DETERMINED THAT THIS CASE INVOLVES ONLY CONTRACTUAL ISSUES AND THAT THE DISTRICT COURT ACCORDINGLY HAD JURISDICTION TO COMPEL ARBITRATION

Petitioner's argument for *certiorari* is based on its contention that the court of appeals held that "a labor union may compel private arbitration of election objections to a National Labor Relations Board (NLRB) conducted representation election." Pet. i; *see also* Pet. 17 (asserting that court of appeals "authoriz[ed] an order compelling arbitration of

objections to an NLRB-conducted election"). Fatal to Petitioner's argument, however, is the fact that the court of appeals did not reach this holding. Indeed, the court of appeals could not have reached the holding suggested by Petitioner (or "authorized" the order suggested by Petitioner) because, as the court of appeals concluded, the Union did not challenge the results of the Board election. The court of appeals stated explicitly that:

> [T]he Union is objecting to the behavior of the Employer in violation of the Guidelines that the parties agreed upon to govern their conduct during the organizing and pre-election drive. . . . *[T]he Union is not objecting to the end result of the election, or attempting to invalidate the results of the election. But rather, the Union is attempting to arbitrate "[t]hese objections [that] consisted of a series of allegations that [Petitioner] violated the [parties'] Agreement."*

Pet. App. 19a n.7 (emphasis added).[1]

Because the Union sought to arbitrate contractual violations covered by an arbitration clause, and did not attack the results of the Board election, the court of appeals reached the entirely unremarkable conclusion that under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), the district court had jurisdiction to compel arbitration. Pet. App. 17a; *see AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) ("*AT&T*") (internal citations omitted) ("[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [an] order to

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[1] The court of appeals appropriately dismissed Petitioner's semantic argument that the Union's allegations of contractual breach—based on the Employer's pre-election conduct—necessarily challenged the results of the Board election by observing that "[r]egardless of the technical label, the Union is objecting to the behavior of the Employer in violation of the Guidelines that the parties agreed upon to govern their conduct during the organizing and pre-election drive." Pet. App. 19a n.7.

arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

Petitioner's argument for *certiorari* accordingly reduces to its claim that the Ninth Circuit mischaracterized the Union's complaint. As Petitioner put it, "[i]n finding that the [Union's] Complaint to Compel Arbitration of its election objections did not raise a 'primarily representational' issue, the Ninth Circuit chose to characterize that Complaint as seeking nothing more than the arbitration of contractual 'violations of the Agreement.'" Pet. 15.

The court of appeals correctly read the Union's complaint, but regardless of whether the court of appeals was correct in how it "chose to characterize" the complaint, the court of appeals' holding remains the same: when the allegations in a motion to compel arbitration concern contractual violations of a private agreement, a district court must enforce the agreement to arbitrate so long as the arbitration clause covers the asserted dispute. This holding—the one actually reached by the court of appeals—is unassailable, and the question of whether the court of appeals construed the Union's complaint correctly is unworthy of this Court's consideration.

Contrary to Petitioner's characterization of the Ninth Circuit's holding, moreover, the court of appeals held that a § 301 suit is *not* an appropriate vehicle for challenging the results of a union representation election conducted by the NLRB. Indeed, the Ninth Circuit applied the well-settled rules that courts "must defer to the NLRB 'when, on close examination, section 301 cases fall within the NLRB's primary jurisdiction,'" and that "[t]o determine whether a case is within the NLRB's primary jurisdiction, 'we have drawn the jurisdictional line by asking whether the major issues to be decided . . . can be characterized as primarily

representational or primarily contractual.'" Pet. App. 14a (quoting *United Ass'n of Journeymen v. Valley Eng'rs*, 975 F.2d 611, 613-14 (9th Cir. 1992); *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1157 (9th Cir. 2000) (internal citations omitted)).

The court of appeals concluded correctly that the case at bar is "primarily contractual" not "primarily representational." Relying on its earlier decision in *Hotel & Restaurant Employees Union v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992), the court explained:

> Just as in *Marriott*, the district court in the present case will not be required to designate . . . an exclusive bargaining agent or identify . . an appropriate collective bargaining unit. Nor will the district court be required to resolve any other representational issues not already resolved by the parties. Rather, the district court in the present case would merely be required to determine whether the arbitration clause in the Agreement is susceptible of an interpretation that covers the asserted dispute, and if so to compel arbitration. Compelling arbitration of the alleged contractual violations will not require the naming of an exclusive bargaining agent or a collective bargaining unit.

Pet. App. 15a-16a (internal citations omitted). The court of appeals accordingly held that "[t]he heart of th[is] case is a contractual rather than a representational dispute," and that "compelling arbitration of the alleged violations of the Agreement . . . raises no representational issues." Pet. App. 16a (internal citations omitted). Because the issue in the case at bar is contractual, the court of appeals correctly determined that the district court had § 301 jurisdiction to enforce the arbitration clause.[2]

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[2] Petitioner's reliance on *Tyler Pipe Industries, Inc.*, 180 NLRB 880 (1970), is misguided. The fact the Board might, in adjudicating election objections brought before it, consider a party's failure to comply with a

## II. THE NINTH CIRCUIT DECISION IS CONSISTENT WITH THE LAW OF ITS SISTER CIRCUITS

Petitioner contends that the court of appeals' decision in the instant case conflicts with the decisions of other courts of appeals. Pet. 11. The contention is entirely without merit and, indeed, Petitioner does not even cite the one circuit court decision on all fours with the case at bar. In *New York Health and Human Serv. Union, 1199/SEIU v. NYU Hospitals Center*, 343 F.3d 117, 119 (2d Cir. 2003) ("*NYU*"), the Second Circuit held that arbitration agreements identical in all relevant respects to the one at issue in the instant case are enforceable where the Board conducts the representation election.

In *NYU*, as here, the union and the employer entered into a private agreement regulating campaign conduct and providing for arbitration of alleged violations of the agreement. *See id.* at 118. Following a representation election conducted by the Board, the union sought to arbitrate whether the employer's pre-election campaign conduct violated the agreement. The Second Circuit held that the district court had jurisdiction to enforce the arbitration clause. *See id.* at 119-20. The *NYU* court specifically rejected the employer's argument that the Board's involvement in conducting the representation election deprived the district court of jurisdiction to compel

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private agreement, in no way alters the fact the allegations *in this case* concerned violations of a private agreement and did not attack the results of the Board-conducted election. Moreover, the section of *Tyler Pipe* relied on by Petitioner is dicta from a portion of the Administrative Law Judge's decision that was never reviewed by the Board. Under Board law, unreviewed determinations by an Administrative Law Judge have no precedential value. *See, e.g.*, *Colgate-Palmolive*, 323 NLRB 515, 515 n.1 (1997).

arbitration. *Id.* at 119 (citing *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993)).

Petitioner also fails to point to a single circuit court decision that conflicts with the court of appeals' decision here. Instead, Petitioner cites decisions from other circuits merely for general propositions of law. Pet. 12 (citing *Local Union 257, Intern. Broth. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180, 1185 (8th Cir. 1997) ("*Sebastian Electric*") (for the proposition that "'[r]epresentational issues fall within the NLRB's primary jurisdiction'"); *Communications Workers of America v. U.S. West Direct*, 847 F.2d 1475, 1479 n.1 (10th Cir. 1988) ("*U.S. West*") (for the proposition that "if case is 'primarily representational,' Section 301 jurisdiction is precluded"); *United Bhd. of Carpenters, Local Union No. 1694 v. W.T. Galliher & Bros.*, 787 F.2d 953, 954 (4th Cir. 1986) ("*W.T. Galliher*") (for the proposition that "jurisdiction under Section 301 is precluded if the contractual dispute is 'primarily representational'"); *Local Union 204 of Int'l Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co.*, 668 F.2d 413, 418-19 (8th Cir. 1982) ("*Iowa Electric*") ("same")). The Ninth Circuit, of course, applied precisely these jurisdictional rules in the case at bar. *See* Pet. App. 14a ("[t]o determine whether a case is within the NLRB's primary jurisdiction, we have drawn the jurisdictional line by asking whether the major issues to be decided . . . can be characterized as primarily representational or primarily contractual") (internal citations omitted).

Strikingly, in *Sebastian Electric*, *U.S. West*, and *W.T. Galliher*, the Eighth, Tenth, and Fourth Circuits all found the disputes before them to be primarily contractual and either ordered arbitration or enforced the arbitration awards at issue. *See Sebastian Elec.*, 121 F.3d at 1186 ("the issues in the present case are primarily contractual"); *U.S. West*, 847 F.2d 1476 ("U.S. West claims that the union grievance raises a

question of representation which should be decided by the [NLRB]. We disagree."); *id.* at 1479 n.1 ("in the instant case . . . the representational issue is collateral to the contract dispute"); *W.T. Galliher*, 787 F.2d at 954 ("We do not believe that this dispute can be characterized as so 'primarily representational' as to preclude section 301 jurisdiction."). And in *Iowa Electric*, while the Eight Circuit held that the district court there lacked § 301 jurisdiction over the dispute before it, the court of appeals explicitly distinguished that case from cases, like the one at bar, involving suits to compel arbitration. 668 F.2d at 419 ("*Carey* [*v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964)] has been consistently interpreted to support district court jurisdiction under section 301 of the LMRA over suits to compel arbitration of a representational dispute where the parties have agreed under the collective bargaining agreement to arbitrate such matters.").

In sum, the court of appeals' decision here is entirely consistent with the law of its sister circuits. Petitioner's assertion of a conflict is meritless.

## III. THE QUESTION OF REMEDIES IS NOT BEFORE THE COURT IN A MOTION TO COMPEL ARBITRATION

Petitioner asserts that the order compelling arbitration in the instant case is inappropriate because "the ultimate issue before the arbitrator will be whether the employees' vote in the NLRB election rejecting union representation should stand or be re-run." Pet. 17. As an initial matter, and again, the court of appeals correctly concluded that the Union here did not challenge the results of the Board election and, in any event, the arbitrator simply does not have authority to set aside the results of an election conducted by the NLRB. More fundamentally, the "ultimate issue" of remedies is not, as a matter of clearly established law, before the district court in a suit to compel arbitration. As this Court has explained, in

a suit to compel arbitration the only question for the district court is whether the arbitration clause is "susceptible of an interpretation that covers the asserted dispute." *AT&T*, 475 U.S. at 650.

More specifically, as this Court and the courts of appeals have made clear, the theoretical potential for a conflict between Board action and an arbitral remedy can not, as a matter of law, serve to bar an order compelling arbitration. This Court stated the rule in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) ("*Carey*"), writing that while arbitral awards "may later end up in conflict with Board rulings . . . the possibility of conflict is no barrier to resort to a tribunal other than the Board." Relying on *Carey*, the Ninth Circuit held in *Hospital & Institutional Workers Union, Local 250 v. Marshal Hale Memorial Hosp.,* 647 F.2d 38, 42 (9th Cir. 1981) that:

> [A]ny conflict between the NLRB and an arbitrator is necessarily speculative when the arbitrator has yet to rule. . . . Conflicts between the arbitrator and the NLRB can be resolved when they become manifest in an action to enforce the award. The mere possibility of conflict, however, is no barrier to arbitration.

(internal citations omitted); *see also Sheet Metal Workers Int'l Ass'n, Local No. 162 v. Jason Mfg.*, 900 F.2d 1392, 1400 (9th Cir. 1990). The Second, Fourth, and Fifth Circuits have all announced the same rule. *See United Food & Commercial Workers Union, Local 400 v. Shoppers Food Warehouse, Corp.*, 35 F.3d 958, 962 (4th Cir. 1994) (adopting rule of sister circuits that "until an arbitrator has ruled, there is not a direct and immediate conflict . . . . [a]nd in the absence of such a conflict, the arbitration clause should be enforced"); *Truck Drivers Local 807 v. Regional Import & Export*, 944 F.2d 1037, 1047 (2d Cir. 1991) ("The mere possibility that the eventual arbitration award may conflict with the Board's ruling is not a cognizable basis for refusing to compel

arbitration."); *Lodge 37, IAM v. Boland Marine & Mfg. Co.*, 591 F.2d 1184, 1187 (5th Cir. 1979) ("[I]t is not for this Court to look at what the outcome of arbitration of (the Union) grievance might be in view of the NLRB's decision; our duty is simply to look at the labor agreement and determine whether this is the sort of question which is covered by the arbitration.").[3]

## IV. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE STIPULATED ELECTION AGREEMENT DID NOT BAR ARBITRATION

Lastly, Petitioner contends that court of appeals erred by "dismissing the binding effect of the NLRB Stipulated Election Agreement" which stated that "postelection and runoff procedures . . . after the ballots are counted shall conform with the Board's Rules and Regulations." Pet. 19. Petitioner points specifically to Board regulations requiring post-election objections challenging the results of Board elections to be filed with the Board within seven days of that election, 29 C.F.R. § 102.69(a), and regulations stating that the Board will adjudicate such objections. 29 C.F.R.

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[3] Respondent does not concede the existence of a potential arbitral award that would conflict with the Board's certification of the results of the election it conducted. First, the arbitrator clearly lacks the authority to disturb the Board's certification of these election results. Second, the National Labor Relations Act's one-year bar on representation elections has run and the Act itself would now permit a new election. *See* 29 U.S.C. § 159(c)(3). Finally, there is quite obviously a wide range of arbitral remedies that would in no conceivable way conflict with the Board's action here (*e.g.*, an order that Petitioner post a notice stating that its pre-election conduct violated the parties' agreement, or an order that Petitioner reimburse the Union for expenses incurred during the organizing campaign.) But, as we have demonstrated, the potential remedies that the arbitrator might order are not at issue in this case. *See, e.g.*, *Carey*, 375 U.S. at 272; *Hospital & Institutional Workers*, 647 F.2d at 42.

§ 102.69(c)-(f). As is clear on the face of these regulations, however, they apply to objections *filed with the Board* regarding challenges to the results of Board elections. Again, as the court of appeals correctly concluded, the Union here did not challenge the results of the Board-conducted election. Pet. App. 19a n.7. Accordingly, regulations regarding such challenges are inapposite and do not bar arbitration of the Union's claims that the Petitioner violated the private agreement.

An identical Stipulated Election Agreement was at issue in the *NYU* case, and there, as here, the employer argued that the stipulation acted as a bar to arbitration. Like the court of appeals here, the Second Circuit in *NYU* held that the stipulation was no bar to arbitration. 343 F.3d at 119-20. In reaching this holding, the Second Circuit explicitly rejected the employer's argument that *Grant's Home Furnishings, Inc.*, 229 NLRB 1305 (1977), dictates a different result. *See id.* at 120. *Grant's Home Furnishings* is the sole case relied on by Petitioner here. Pet. 18-20.[4]

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[4] Petitioner's final argument, that the court of appeals' holding is a "collateral attack" on the results of the Board election, Pet. 21, is a repackaging of its primary argument that the court's holding "authoriz[es] an order compelling arbitration of objections to an NLRB-conducted election," Pet. 17, and suffers from the same flaw. The court of appeals' decision does not amount to an attack, collateral or otherwise, on the Board election because, as the court of appeals explained, "the Union is not objecting to the end result of the election or attempting to invalidate the results of the election." Pet. App. 19a n.7.

## CONCLUSION

For the above-stated reasons, the petition should be denied.

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March 1, 2004

(3)

No. 03-1083

FILED
MAR 16 2004
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

ST. VINCENT MEDICAL CENTER; DAUGHTERS OF CHARITY HEALTH SYSTEMS INC.,

*Petitioners,*

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITIONERS' REPLY BRIEF

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AMERICAN FINANCIAL PRINTERS • (202) 464-5500

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## PETITIONERS' REPLY BRIEF

## STATEMENT

In this case, the United States District Court for the Northern District of California was specifically asked by the Respondents SEIU to issue an order compelling Petitioner St. Vincent "*to arbitrate the dispute regarding the SEIU's objections to the September 26 and 27, 2001 [NLRB conducted] election*" (ER 5, emphasis added). Ruling on the complaint to compel before it, the U.S. District Court properly found that the issue presented by the complaint was a representational issue that fell within the primary jurisdiction of the NLRB. Pet. 22a-24a.

Although the SEIU's complaint to compel arbitration, by its own terms, was expressly directed at "*objections to the September 26 and 27, 2001 election,*" the SEIU on appeal sought to engage in a revisionist recasting of its complaint to assert that it merely desired to have a private arbitrator rule on whether certain alleged *pre*-election conduct violated the parties' contractual agreement. Although it cannot seriously be disputed that "objections to an election" by definition challenge the validity of the results of an election, the Ninth Circuit Court of Appeals in a footnote in its Opinion reversing the District Court noted that "it appears" the SEIU is not objecting to the result of the election since the "objections ... consisted of a series of allegations [the Employer] violated the Agreement." Pet.19a n.7. Seizing on this footnote reference, the SEIU principally argues in its opposition brief that no representational issue is raised by their complaint to compel arbitration of election "objections." However, contrary to the Ninth Circuit's mistaken view, even where based on alleged violations of a private contractual agreement, "objections" to an election necessarily raise a representational issue within the NLRB's exclusive primary jurisdiction. Thus, the principal argument raised by the

SEIU in opposition to certiorari is groundless, and exemplifies the need for this Court's intervention to clarify and reaffirm what had been commonly understood before the Ninth Circuit's ruling – that deciding "objections" to an NLRB election is a matter peculiarly within the NLRB's special administrative expertise and primary jurisdiction.

The other assertions raised by the SEIU in opposition to the petition for certiorari are equally without merit. The SEIU argues that the Ninth Circuit's opinion conflicts with no other court ruling, but it can only make that argument by ignoring many of the cases cited in the Petition. Indeed, the opposition reveals a deeper division among the circuits than the Ninth Circuit's ruling alone. The opposition next argues that any remedy an arbitrator might issue in deciding the union's untimely election objections is irrelevant. This, however, begs the fundamental question of whether an arbitrator should be permitted at all to consider belated election objections to an NLRB-conducted election proceeding that has long been certified and closed. Finally, the SEIU argues the NLRB's Stipulated Election Agreement and the NLRB's Rules and Regulations requiring that election objections be brought before the NLRB can supposedly be avoided simply by a party bringing a wholly collateral arbitral proceeding in disregard of those legal obligations. This argument plainly fails as a matter a circular logic.

## ARGUMENT

1. The SEIU devotes much of its brief to repeatedly asserting that it was not seeking to compel arbitration of any challenge to the NLRB-conducted election in this case that resulted in the SEIU being denied certification as the employees' collective bargaining representative. However, the SEIU does not and cannot dispute that the bringing of "*objections*" after an NLRB election has been held is the

procedure by which a party challenges the validity of the results of the election. As the NLRB has stated: "The validity of an election may be questioned by filing objections to the conduct of an election or to conduct affecting the results of an election. ... Objections may have the effect of invalidating an election. If this occurs, the election may be 'rerun'..." Office of the NLRB General Counsel, *An Outline of Law & Procedure in Representation Cases* §22-116 (1999).

The SEIU's complaint before the U.S. District Court expressly sought an order compelling Petitioner "to arbitrate the dispute regarding the SEIU's *objections to the September 26 and 27, 2001 election*" (ER 5, emphasis added). The complaint did *not* state, as the SEIU claimed for the first time before the Ninth Circuit and as it would now have this Court believe, that the union was simply seeking arbitration of alleged pre-election contractual violations that had no claimed impact on the election. On the contrary, the complaint to compel arbitration specifically stated that "following the election, in accordance with Section II.E.16 of the Agreement, the Union filed objections to the election" consisting of allegations that the Employer violated the Agreement. (ER 4 ¶ 14). Section II.E.16 of the parties' Agreement states:

> **Recognition:** The Employer agrees to recognize the Union as the collective bargaining agent on behalf of employees in any appropriate unit at facilities where a majority of employees voting, vote for union representation, subject to the decision of the Arbitrator or Election officer resolving any outstanding objections to the election. Such objections must be filed by either party within three working days of the election. Upon certification of the Union as the collective bargaining representative, the

> parties will immediately commence good faith negotiations over the applicable contract..."

(ER 8-9). As the SEIU's own complaint admits that the election objections in this case were expressly brought pursuant to a "*recognition*" clause under which objections are raised as an integral part of the process of deciding whether there should be a "certification of the Union as the employees' collective bargaining representative," it plainly shows that the Ninth Circuit was incorrect when it found that the SEIU's objections to the election "raise no representational issue" (Pet.App.16a). It also gives proof to the wholly revisionist nature of the SEIU's current assertion that the objections it seeks to arbitrate were supposedly "not" directed to the result of the election denying it certification as the employees collective bargaining representative.

The Ninth Circuit's holding that the SEIU's objections did not raise a representational issue merely because they were based on alleged *pre*-election conduct erroneously applies, and thus undermines, previously established law. Objections to an election can either challenge the "conduct of an election" itself (e.g., that the election was not held at the designated times, that election campaigning was permitted to occur in the voting area), or "conduct affecting the result of the election" (e.g., a claim as in the this case that the election was impermissibly tainted by alleged wrongful pre-election conduct by one of the parties). See 29 C.F.R. § 102.69(a). As was again discussed more fully in Petition (Pet. 15-16), objections challenging the result of an election may be based on pre-election conduct allegedly in violation of a private agreement between the parties regulating such conduct. *Tyler Pipe Industries, Inc.*, 180 NLRB 880, 881, 890 (1970). The SEIU's opposition brief cites no case authority to the contrary.

Thus, the mere fact the SEIU's objections were based on alleged violations of a private agreement's rules regarding pre-election conduct, does *not* make those alleged violations *when brought as "objections" to an NLRB-conducted election* any less of a matter for the NLRB to decide under the "primary jurisdiction" rule that is at the heart of this case. The Ninth Circuit's holding as described by the SEIU, that without qualification or exception, "when allegations in a motion to compel arbitration concern contractual violations of a private agreement, a district court must enforce the agreement to arbitrate so long as the arbitration clause covers the asserted dispute" (Opp. 4), shows the overbroad and flawed nature of that holding. When brought as *objections* to an NLRB-conducted election, violations of a private agreement's rules regarding pre-election conduct remain a matter within the NLRB's primary jurisdiction.

The U.S. District court correctly interpreted the SEIU's complaint before it as being one to compel private arbitration of *election objections* brought as part of the "recognition" process to determine whether the SEIU should be certified as the employees' bargaining representative. The SEIU's appellate recharacterization cannot insulate from review the Ninth Circuit's erroneous holding permitting such a "representational issue" to be decided by an arbitrator rather than the NLRB. This Court should redress that error.

2. The SEIU in its opposition brief does not address, because it cannot contest, the fact that this Court and, until recently, all the other circuit courts of appeals have uniformly recognized that the determination of "*election objections*" is uniquely a matter of an administrative nature within the NLRB's special expertise. *See*, *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1123-1124 (7th Cir. 1975) and

*NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1559 (11th Cir. 1984). Nor does the SEIU dispute that this Court has also unambiguously declared that under the "primary jurisdiction" doctrine, federal administrative agencies such as the NLRB may *not* be bypassed where the matter at issue requires just such an exercise of administrative expertise. *International Bhd. of Boilermakers [etc.] v. Hardeman*, 401 U.S. 233, 238 (1971). Instead of directly responding to the conflict between the Ninth Circuit's Opinion below and these earlier rulings as shown in the Petition (Pet. 12-17), the SEIU instead tries to point to another recent appellate court ruling, *New York Health and Human Serv. Union, 1199/SEIU v. NYU Hospitals Center*, 343 F.3d 117 (2d Cir. 2003) ("*NYU*"), which it asserts is supposedly "on all fours" with the case at the bar (Opp. 6). In the *NYU* case, the second circuit did approve private arbitration of election objections to an NLRB-conducted election, but as is case with the Ninth Circuit's ruling below, the *NYU* decision also does not try to address, let alone resolve, the conflict between its ruling and the earlier decisions of this Court and the other circuit courts holding that the resolution of election objections requires the application of special administrative expertise which prohibits a bypass of the NLRB. If anything, the *NYU* ruling shows an even greater split between the circuits, and a more compelling need for this Court's intervention to clarify the law in this area.

Moreover, the *NYU* case is far from being "on all fours" with the case at the bar. In the *NYU* case, the parties' private agreement permitted arbitral review of election objections (violations of rules of conduct asserted to have affected the outcome of the election) only if such objections were also filed with and still *pending* before the NLRB. Then, depending on the arbitrator's award, there would either be a party stipulation for a re-run NLRB election or a voluntary withdrawal of the objections before the Board.

Nothing in the private agreement in the *NYU* case, or in the *NYU* court's opinion, permitted an arbitrator to rule on election objections after the NLRB had *already certified* the results of the NLRB election – as will be allowed here under the Ninth Circuit's ruling. As shown in the Petition (Pet.21-24), to permit such a collateral attack on an already decided and closed NLRB election proceeding undermines federal labor policy by creating intolerable industrial instability. *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49, 55 (5th Cir. 1963).

3. The SEIU's opposition next argues that this Court should ignore the Ninth Circuit's ruling allowing an arbitrator to rule on belated election objections after the NLRB has already certified the results of the election because, according to the SEIU, the arbitrator might issue only a limited remedy (Opp. 8-10). However, the issue is not whether an arbitral remedy other than a re-run election is even possible where the arbitrator is being asked to rule on alleged *election objections*, but rather should a private arbitrator be permitted to even *consider* belated election objections to an NLRB-conducted election proceeding that has long been certified and closed. Permitting an arbitrator to independently evaluate and rule on untimely election objections to an NLRB-conducted election, even assuming the arbitrator were to issue *no* remedy, still improperly undermines the finality of the Board's proceedings. As the NLRB has already certified that the outcome of the September 2001 election was entirely proper, there is nothing left for an arbitrator to consider in the form of election objections. Again as stated in *Iowa Elec. Light & Power Co.*, 668 F.2d 413, 419 n. 11 (8th Cir. 1982), "[w]hen the Board issues an order determining the dispositive representational issue, no contractual issues remain to be decided through arbitration or bargaining." The Ninth Circuit's opinion erroneously permits a wholly collateral proceeding under which an arbitrator can ultimately decide

election objections long *after* the NLRB has already certified the results of the election and closed the representation proceeding.

4. Finally, the SEIU in its opposition (Opp. 10-11) again tries to cite to the *NYU* case for the broad proposition that permitting an arbitrator to decide objections to an NLRB conducted election does not violate the binding nature of the NLRB's Stipulated Election Agreement ("SEA") that requires all post-election proceedings comply with the Board's rules and regulations. The *NYU* case, however, once again presented a different factual situation than exists here. Under the private agreement in the *NYU* case, election objections had to still be timely filed with the NLRB in accord with the Board's rules and regulations, to ultimately be followed (depending on the arbitrator's findings) by either a party stipulation for an NLRB re-run election or a voluntary withdrawal of the objections pending before the NLRB. Nothing in the NLRB's rules and regulations or the terms of the Board's SEA requiring compliance with those rules and regulations prohibit either a stipulated re-run election or a withdrawal of pending objections as provided in the NYU agreement. *See e.g.*, *Pontiac Ostepathic Hosp.*, 336 NLRB 1021, 1026 (2001) (recognizing an employer and unions have the ability to stipulate to a re-run election) and *K-Mart Corp.*, 336 NLRB 455, 457 (2001) (recognizing a party's ability to withdraw its pending election objections). Here, in comparison, the Ninth Circuit's opinion ignores that *both* the parties' agreement and the SEA expressly require compliance with the Board's rules and regulations that, in turn, require that post-election objections be timely filed with the *NLRB* (see Pet. 19 n. 15), which was admittedly *never done* in this case. The SEIU admits that had it filed its election objections with the NLRB in compliance with requirements of the SEA that the Board's Rules and Regulations would apply, but asserts that since it did *not* comply with the SEA, the

Board's Rules and Regulations are inapplicable. Opp. 11. The SEIU's opposition thus postulates the clearly flawed and circular proposition that a party can effectively avoid its legal obligations simply by failing to comply with them.

In sum, despite the SEIU's revisionist claims, the Ninth Circuit's decision below conflicts with the "primary jurisdiction" doctrine as previously enunciated by this Court and other courts of appeals recognizing that the resolution of NLRB *election objections* requires application of the NLRB's special administrative expertise. The Ninth Circuit's decision further undermines the NLRB's election processes and fosters industrial instability by disregarding a binding NLRB Stipulated Election Agreement and permitting a wholly collateral attack on a previously decided and long closed NLRB representation proceeding. It is imperative that this Court clarify the proper role of the NLRB versus an arbitrator in the resolution of election objections to an NLRB-conducted election.

## CONCLUSION

This Court should grant the petition for certiorari.

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March 16, 2004